In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 208

UNITED STATES EX REL. HOWARD CHARLES LIPSITZ,
PETITIONER

v.

MAJOR GENERAL GINES PEREZ, COMMANDING GENERAL, FORT JACKSON, SOUTH CAROLINA,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

On May 17, 1966, petitioner was inducted into the United States Army and was stationed at Fort Jackson, South Carolina. On May 24 he filed a petition for a writ of habeas corpus in the United States District Court for South Carolina, alleging procedural irregularities in the induction process. After a hearing, relief was denied by the district court (Pet. App.

1-12). The court of appeals affirmed *per curiam* (Pet. App. 13-15).

The relevant facts [1] show that on June 9, 1965, petitioner was classified 1-A by his local draft board (Pet. App. 4).[2] Petitioner's application for an occupational deferment was denied, and his 1-A classification was renewed after a hearing before the local board. On October 19, 1965, the State Appeal Board reaffirmed petitioner's 1-A classification by a unanimous vote, and petitioner was ordered to report for induction on November 19, 1965. On November 5 petitioner sent a letter to President Johnson requesting personal intervention and review (Pet. App. 5; R. 82-83). On November 24, 1965, National Selective Service headquarters in Washington, D. C., directed that petitioner's induction be postponed and that his file be forwarded to the National headquarters for review (Pet. App. 5). On November 29 petitioner's local board notified petitioner that his induction had been postponed. An accompanying letter emphasized that the induction was merely postponed, and that the order to report for induction was not cancelled. The

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[1] The undisputed facts are taken from the district court's findings of fact, which were as requested by petitioner (Pet. App. 1-8). References herein are also to the record on appeal ("R.") and to the transcript of hearing ("Tr."), the latter of which we are lodging with the Clerk of this Court.

[2] Petitioner's local board was Draft Board #37, Paterson, New Jersey. On three earlier occasions, petitioner had been classified 1-A, but was thereafter deferred on the grounds that he was a student in pursuit of a Bachelor's degree (Pet. App. 2), a Master's degree (Pet. App. 2-3), and a Doctor's degree (Pet. App. 4).

local board was informed on January 7, 1966, that National headquarters had taken an appeal to the Presidential Review Board—action which under Selective Service regulations (32 C.F.R. 1627.8) automatically invalidates an order to report for induction. The local board did not inform petitioner, as required by 32 C.F.R. 1627.5(a)(1), that an appeal had been taken to the presidential board (Pet. App. 5-6).

Petitioner was classified 1-A by the Presidential Review Board, and was so notified on March 3, 1966 (Pet. App. 6). On March 21, 1966, he was ordered by his local board to report for induction on April 7, subsequently changed to May 17, 1966 (Pet. App. 7-8).

On March 3 petitioner sent another letter to President Johnson criticizing the action of the Presidential Review Board (R. 85-91), in which he stated that subsequent to November 5, 1965, he had been informed by Senator Case's office that a review of his case would be taken before the Presidential Review Board (R. 85). On April 5 petitioner wrote a letter to his local board, copies of which were sent to President Johnson, General Hershey, Senator Case, and the American Civil Liberties Union, complaining that he had had no official notice of the presidential appeal before March 3, 1966, "other than through word of mouth speculation through an assistant in Senator Case's office" (R. 94). At the hearing, petitioner testified that he was prejudiced by the failure of the local board to give him notice of the presidential appeal, since, had he known of that fact between January 20 and March 3, 1966, he would have also known

that the order of induction was effectively cancelled (pursuant to 32 C.F.R. 1627.8), thereby allowing him to join a Reserve component of the Armed Services (Tr. 15, 17).[3]

In rejecting petitioner's claim of prejudice and denying the petition, the district court found that (1) petitioner had *actual* knowledge of the presidential appeal; and (2) that petitioner was not sincere in his belated claim that he intended to join the Reserves had he known of the cancellation of induction, since he actually had had ample opportunity to do so. The court of appeals affirmed these findings. Petitioner now in effect seeks no more than reconsideration of these factual findings; in any event, he can show no prejudice from the failure to receive formal notice of the presidential appeal. There is thus no occasion for further review.

A procedural irregularity such as is here involved is not a basis for rendering an otherwise proper induction procedure a nullity, absent a showing of prejudice. *United States ex rel. Woodard* v. *Deahl*, 151 F. 2d 413 (C.A. 8); see also *United States* v. *Lawson*, 337 F. 2d 800, 812 (C.A. 3); *Pate* v. *United States*, 243 F. 2d 99, 104 (C.A. 5); *Martin* v. *United States*,

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[3] Prior to January 20, 1966, a registrant such as petitioner could, until the actual date of induction, seek and obtain release from the order of induction upon a showing that he had enlisted in a Reserve component of the Armed Services. On January 20, the Secretary of Defense issued Operations Bulletin No. 287, which in effect prevented a registrant from joining the Reserves if he was under an order to report for induction. Petitioner testified that he was aware of Operations Bulletin No. 287 (Tr. 52-53).

190 F. 2d 775 (C.A. 4).[4] The district court properly concluded that, on the facts of this case, petitioner was not prejudiced by the failure to notify him of the presidential appeal. There was ample evidence—the fact that petitioner initiated efforts to secure presidential review, and the admissions in his letters—that petitioner had actual knowledge of the presidential appeal. A formal notice that such an appeal had been taken would thus have told him no more than he already knew. Under the regulations (of which petitioner was obviously aware), the fact of a presidential appeal—not the notice of the taking of the appeal—had the effect of invalidating the order to report for induction.[5] Moreover, petitioner was formally notified of the presidential review on March 3, 1966, and thus knew at that time that he was free

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[4] Petitioner cites (Pet. 14) *United States* v. *Stiles*, 169 F.2d 455 (C.A. 3), as evidencing a conflict among the circuits. In *Stiles* the registrant was classified 1-A, but was not classified *anew* after a personal hearing as required by the then-existing provisions of 32 C.F.R. 625.1. As the court stated in *Stiles*, the purpose of the regulation was to assure the registrant that the reclassification was based upon evidence produced at the hearing, and not upon ideas preconceived before the hearing. Thus, the court found that the registrant was indeed prejudiced by the failure of reclassification, since for purposes of appeal, he was unable to ascertain on what information the board had rested its decision.

[5] The letter of November 29, 1965, from the local board informing petitioner that his order to report for induction was only postponed, not cancelled, was correct, since, at that time, petitioner's file had simply been forwarded to the National Selective Service headquarters, and there was no indication at that time that the National headquarters would recommend a presidential appeal.

to enlist in the Reserves. He made no effort, however, to join a Reserve component between that date and March 21, 1966, when a new order of induction was issued by his local board.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
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JUNE 1967.

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[6] Petitioner could also have sought to join the Reserves prior to January 20, 1966, regardless of whether he was under an order to report for induction (see note 3, *supra*; see also Pet. App. 11).

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